No. 10-606

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE SCOTT ALAN HEIMERMANN,

Petitioner

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

ON PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner, Scott Alan Heimermann, respectfully petitions for rehearing the Court's December 6, 2010 decision. Specifically, he asks for an order (1) granting rehearing and (2) thereafter grant Petitioner's request for the 'as-yet-undisclosed-state-evidence' as itinerated in Exhibit 11 of the attached Affidavit of Scott Alan Heimermann dated December 30, 2010, a copy of which is annexed hereto as Appendix A.[1]

GROUNDS FOR REHEARING

Although this Court almost never grants petitions for rehearing, this case meets the rare exception contemplated by Supreme Court Rule 44.2.

In the present case "now is the time to say without equivocation: this 'cost' to the liberty of [the Petitioner], to our system of justice is not remotely acceptable. No man's liberty is dispensable. No human being may be traded for another. Our system cherishes each individual. We have fought wars over this principle. We are still fighting these wars." ***Limone v. United States***, 497 F. Supp. 2d 143, 153 (D. Mass. 2007). The indisputable facts showing that Petitioner is factually innocent are chillingly similar to the ***Limone*** case. Petitioner is an innocent man serving consecutive life sentences for a law enforcement investigation that killed a FBI Top Ten fugitive and his bodyguard drug dealer in a residential property he purchased through a real estate scheme perpetrated by law enforcement and their career informant during the course of undercover drug investigations in 1989. (*See* Petition at 13-14; *see also* Affidavit of Scott Alan Heimermann (Appendix A at 5-7.) From the moment Petitioner witnessed the two

[1] Petitioner uses "Petition at ___" when he refers to a page in his Petition for Extraordinary Writ of Habeas Corpus. He will use "Appendix A at ___" when he refers to a page in the attached Affidavit of Scott Alan Heimermann.

murders, through his trial, and through his series of state and federal post-collateral challenges, he has vehemently maintained his innocence. (*See* Petition App. at 2a-3a, ¶¶ 2-3.)[2] The analogy is therefore *Mooney v. Holohan*, 294 U.S. 103, 113 (1935), which specifically explained that where defendant asserted his innocence and a wrongful conviction due to deliberately fabricated and improperly suppressed evidence, habeas courts must hear the claim.

So far, the Wisconsin state courts have repeatedly made determinations regarding Petitioner's imprisonment or freedom absent discovery and an evidentiary hearing with live testimony, despite volumes of new evidence of innocence. Petitioner's efforts to obtain federal relief have also been repeatedly rebuffed because, due to procedural missteps, the district court in 1996 dismissed Petitioner's first federal habeas petition on procedural default grounds, without the district court ever applying the *Schlup v. Delo*[3] actual innocence gateway standard to Petitioner's claims. *See Heimermann v. Abrahamson*, No. 95-C-1101 (E.D. Wis. Jan. 5, 1996).

In arguing for rehearing, Petitioner points to three grounds that deal with the Questions Presented: (1) continued life imprisonment where there is no state or federal avenue open to process a compelling claim to innocence violates the substantive component of the Due Process Clause of the Fourteenth Amendment; (2) there is no question based on the record today that Petitioner is factually innocent to overcome any concerns with 'finality,' and (3) the Court should at least afford Petitioner the opportunity to first obtain the 'as-yet-undisclosed-state-evidence' before denying him the right to have an evidentiary hearing for his claims of innocence on the merits.

[2] Petitioner uses "Petition App. at ____" when he refers to a page in the Appendix of his Petition.

[3] *See* 513 U.S. 298 (1995).

The aforementioned grounds make a measurable contribution to the argument advanced in the Petition that "continuing to incarcerate the 'actually innocent' is just as violative of Eighth Amendment as executing them." (Petition at 26.)(quoting dissenting opinion of Judge Zilly in ***Souliotes v. Evans***, 622 F. 3d 1173, 1183 n.3 (9th Cir. 2010)).

Petitioner regrettably did not advance the aforementioned substantive grounds beforehand. Petitioner first became aware of the substance of them from further extensive legal research that came subsequent to filing his Petition.

Petitioner's mistake, however, should neither impede the Court's work nor diminish its fealty to justice, fairness, and the Constitution. These grounds are directly relevant, if not essential, to the Questions Presented. Plus, the Court's decision denying review of those questions is factually and legally erroneous without considering them. Absent rehearing, the wrongful imprisonment of a *factual innocent* person will continue without discovery, argument, and briefing. Petitioner therefore respectfully, and humbly, submits that rehearing is warranted in this very rare and exceptional case.

I. REHEARING IS WARRANTED IN LIGHT OF THE FACT THAT PETITIONER'S COMPELLING CLAIM OF ACTUAL INNOCENCE SHOCKS THE CONSCIENCE SUFFICIENTLY TO VIOLATE SUBSTANTIVE DUE PROCESS.

In ***McGhee v. Pottawattamie***, 475 F. Supp. 2d 862, 905 (S.D. Iowa 2007), the district court evaluated a substantive due process claim based upon law enforcement "engag[ing] in a purposeful conspiracy to manufacture, and did in fact, manufacture false evidence against him to falsely formulate a pretense of probable cause" (citation omitted), and on the authority of ***Reno v. Flores***, 507 U.S. 292, 301-02 (1993)(finding a substantive due process claim "forbids the government to infringe certain 'fundamental '

liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve compelling state interest".).

A claim of actual innocence, as in the instant case, cannot escape a fundamental fairness analysis under the substantive due process standard. As such, determining whether Petitioner has a clear and convincing claim to innocence that rises to the level of a clearly established fundamental liberty interest requires a subjective analysis of facts by this Court. As noted above, and in his Petition, Petitioner has received no such analysis by *any* court of his claims of actual innocence on their merits.

In the present case, once career informant Edward Piscitello and Joseph Isajiw committed the August 19, 1989 murders, Milwaukee law enforcement knew about them and who was responsible for them. (Appendix A at 7.) Law enforcements' concerns about the homicides were secondary to their pursuit of Piscitello's other then-ongoing undercover investigations (Appendix A at 8), intent so much in bringing those investigations to fruition that Piscitello was threatened by detective Debraska with prosecution for those homicides if he refused to cooperate. (Appendix A at 8.) From the onset of the night of these shootings, Petitioner was *not* implicated. (Appendix A at 8-9.)

After nearly 18 months of further undercover work, Piscitello confessed to the murders to IRS Agent Michael Spang and other local law enforcement on January 15, 1991. (Appendix A at 10.) Piscitello advocated for the disclosure of these homicides for two months (Appendix A at 11-12), before law enforcement personnel conceded after Piscitello threatened to go to the media to make the murders public. (Appendix A at 13-14.) At *no* time during this confession was Petitioner *ever* implicated.

On March 7, 1991, MPD officers concocted the Trojan horse through Piscitello that concealed their knowledge of the murders before that same date – additionally obscuring their recklessness in, and culpability for the homicides – to legitimize the legal basis for 'discovering' the murders. (Appendix A at 14-15.)

Piscitello's lengthy confession, *again*, did *not* implicate Petitioner.

The Milwaukee law enforcement and prosecutors knew Piscitello was lying at the March 8, 1991 search warrant proceedings but nevertheless vouched for him to the Court Commissioner, (Appendix A at 16-18), later rewarded him with immunity, money and witness protection, (Appendix A at 18-19), and, thus, suborned his perjured search warrant testimony about describing the murders and putting *himself* as a mere bystander. However, here, Petitioner was *not* implicated in the homicides. (Appendix at 16.)

Later, on March 13, 1991, when Piscitello took and passed a polygraph test, *again*, Petitioner was *not* implicated in these murders. (Appendix A at 18-19.)

On April 15, 1991, at the arrest warrant proceedings, based on evidence to date that Petitioner was not implicated in the murders, detective O'Keefe's intentional creation of damaging facts relating to the Joanne Danbrova submissions were then used to falsely implicate Petitioner in these homicides. (Appendix A at 23-27.)

And on May 15, 1991, at the second preliminary hearing, Petitioner's counsel was specifically denied access to the exonerating March 8, 1991 search warrant proceedings and any information related to Piscitello's involvement with law enforcement for Binwalee's and Russell's murders. (Appendix A at 30-32.) Additionally, at the said preliminary hearing, Petitioner was bound over for trial based on the perjured testimony of O'Keefe, who merely parroted the story from the April 22, 1991 statement

of self-confessed murderer Joseph Isajiw, which O'Keefe knew was a false story because Piscitello, a murderer himself and career informant, had repeatedly told MPD so – directly and indirectly – since the onset of the night of the murders. (Appendix A at 33.)

Mooney v. Holohan, 294 U.S. 103, was decided specifically to safeguard against such arbitrary and capricious governmental action: Due process is "a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Id.* at 112. The central purpose of any system of criminal justice is to convict the guilty and *ensure that the innocent go free*. *See U.S. v. Nobles*, 422 U.S. 225, 230 (1975)(citing *Berger v. U.S.*, 295 U.S. 78, 88 (1935)).

Here, Milwaukee law enforcement and prosecutors utilized both false and perjured testimony at the search warrant, arrest warrant, preliminary hearing, and subsequent trial proceedings in order to compel Petitioner's cooperation initially against Isajiw, and later to cover up their knowledge of, and culpability for these homicides.

Petitioner has factually and substantially illustrated detective O'Keefe's four instances of perjury (Appendix A at 17, 24-26,33,36-38), Detective Vincent Vitale's perjury (Appendix A at 34), and MPD's extensive and exhaustive efforts to cover up what really happened in the August 19, 1989 murders of Binwalee and Russell. (Appendix A at 7-41.)

"Where defendant asserted his innocence and a wrongful conviction due to perjured testimony and improperly suppressed evidence, habeas courts must hear the claims." *In re Davis*, 2010 U.S. Dist. LEXIS 87340, at *130 (S.D. Ga. Aug. 24, 2010)

(citing ***Mooney v. Holohan***, *supra* at 113.) Accordingly, this Court has not hesitated to grant the original writ based on deliberate fabrication of evidence by law enforcement and evidence of a petitioner's actual innocence before, and should not do so now.

II. REHEARING IS WARRANTED BECAUSE PETITIONER HAS ADVANCED A COMPELLING CLAIM OF ACTUAL INNOCENCE TO OVERCOME ANY CONCERNS WITH 'FINALITY.'

Until this Court ruled on Troy Anthony Davis's original writ of habeas corpus on August 17, 2009, like Petitioner, Mr. Davis was never granted an evidentiary hearing for his post-conviction claims of innocence at any state or federal level. ***In re Davis***, 130 S. Ct. 1 (2009). Also like Petitioner, (Petition App. 2a-3a,¶¶2-3), Mr. Davis had filed *numerous* motions requesting a new trial, and petitions for writs of *habeas corpus* in his quest to prove his innocence. *See* 130 S. Ct. at 4. Moreover, while this Court did not affirmatively act on the merits of Mr. Davis's petition, it did remand Mr. Davis's original habeas petition to the district court for an evidentiary hearing to determine "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *See* 130 S. Ct. at 1. The district court ultimately found Mr. Davis's freestanding claim of actual innocence specifically in the Eighth Amendment, *see* ***In re Davis***, 2010 U.S. Dist. LEXIS 87340, at *137, but was not persuaded by Davis's claims of actual innocence. *Id.* at ** 210-216.

Additionally, despite Mr. Davis's case being a capital one, since the ***Davis*** decision courts have begun to apply the ***Davis*** doctrine in non-capital cases like Petitioner's. *See, e.g.*, ***Mulero v Thompson***, 2010 U.S. Dist. LEXIS 123485 (N.D. Ill. Nov. 9, 2010). Until ***Mulero***, the courts within the Seventh Circuit simply have concluded that freestanding innocence claims are not cognizable in non-capital cases. *See*

Milone v. Camp, 22 F. 3d 693, 700 (7th Cir. 1994). Therefore, despite the Court's apparent focus on 'finality,' if Petitioner can convince this Court that he is factually innocent, it must grant his original writ for habeas corpus, as to continue to incarcerate a human being with a compelling claim to actual innocence would shock the conscience sufficiently to violate substantive due process.

Put simply, the Court cannot have confidence in the outcome of Petitioner's second trial. The overwhelming evidence of innocence detailed in the attached Affidavit of Scott Alan Heimermann (Appendix A) entitles Petitioner to have all of his claims heard on the merits. Any determination with respect to innocence must be made "in light of all the evidence," including both "newly discovered" evidence, meaning evidence not available at the time of trial, but for one reason or another was not put before the jury. *See Schlup*, 513 U.S. at 327.

The Milwaukee prosecutors relied on three pieces of evidence to prove its case-in-chief: (1) Joseph Isajiw's "okay" testimony that Petitioner 'agreed' to lure Binwalee and Russelll to their deaths; (2) Joanne Danbrova's testimony that she 'heard' a discussion between "the defendant [Petitioner] and Piscitello" and that in the course of that alleged dicussion she overheard Petitioner state "in order to get T.C. they would have to go through his body guard" and "[k]ill him;" and (3) lead homicide detective Vincent Vitale's testimony, who testified that "Milwaukee Police Department had no knowledge of this homicide at the time Mr. Piscitello was an informant." (Petition at 6.) An analysis of the attached Affidavit of Scott Alan Heimermann (Appendix A), reveals that none of the Milwaukee law enforcement and prosecutors' theories holds any weight and that no reasonable juror would vote to convict Petitioner based on the current state of the record.

As detailed in the attached Affidavit of Heimermnan (Appendix A), newly discovered evidence, unavailable at the time of Petitioner's trial, viewed in conjunction with the sought after 'as-yet-undisclosed-state-evidence' and other evidence refuting the prosecution's theory of guilt which was never presented at trial, *conclusively eviscerates* the prosecution's murder theory and undermines *any* confidence in the jury's verdict. In other words. Petitioner was tied to the crime scene only by conclusively false physical evidence (a real estate scheme perpetrated by law enforcement and their career informant for their war on drugs against Binwalee and his and other criminal organizations). And coerced witnesses (Isajiw and Danbrova) with ulterior motives. Compelling evidence consisting of Milwaukee law enforcement's own reports and employees exists that the criminal proceedings were contrived to cover up law enforcement's recklessness in causing the murders during the course of the drug investigations against Binwalee and his gang. Ample evidence exists showing that Petitioner had no motive to commit the murders. Not only did Petitioner not possess a motive for these murders, but at no time was Petitioner *ever* implicated as an actor or participant in *any* conspiracy or acts leading to the deaths of Binwalee and Russell. Career informant Piscitello specifically had numerous contacts with law enforcement about these homicides, from August 19, 1989 through March 7, 1991, and yet the record shows he never 'confessed' to any participation of *Petitioner in these homicides.* Absolutely *none* of this evidence was presented to the jury that convicted Petitioner. Accordingly, the evidence of Petitioner's factual innocence is overwhelming, and this showing entitles him to have his claims of innocence heard on the merits.

III. REHEARING IS WARRANTED BECAUSE PETITIONER IS AT A MINIMUM ENTITLED TO HABEAS DISCOVERY IN ORDER TO DETERMINE WHETHER AN EVIDENTIARY HEARING IS EVEN NECESSARY ON HIS CLAIMS.

Petitioner has spent almost two decades in prison for a crime he did not commit and he *still* does not have the complete law enforcement file concerning the August 19, 1989 murders. (*See* Appendix A, Ex. 11 at 1-10.) He asserts that the Court should at a minimum grant him access to the 'as-yet-undisclosed-state-evidence' in order to determine whether an evidentiary hearing is w[illegible]ted on claims of his innocence.

This Court has noted with approval the Advisory Committee's suggestion that there may be instances in which discovery *before* an evidentiary hearing would be beneficial and might obviate the need for such a hearing. *See* ***Blackledge v. Allison***, 431 U.S. 63, 81 (1977). This proposition holds true without Petitioner meeting the high standard for an evidentiary hearing under the AEDPA. *See* James L. Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure, 708 n. 4 (1998) (noting that "although recent legislature [AEDPA] limits the availability of evidentiary hearings in certain circumstances, it does not appear to limit other fact-developing techniques ... for proving factual allegations through evidence generated with the aid of financial assistance, discovery, and other investigative measures") In Petitioner's case, such Milwaukee law enforcement and prosecutors' deliberate misconduct predicated Petitioner's pre-trial arrest, later prosecution, and subsequent convictions. Thus, the Court should at least afford Petitioner the opportunity to *first* obtain the 'as-yet-undisclosed-state-evidence' in order to present evidence on claims of deliberate fabrication of evidence and innocence before deny[illegible] him the right to have an evidentiary hearing based on those claims.

CONCLUSION

The Court should grant this Petition for Rehearing, the order entered December 6, 2010, denying the Petition should be vacated, and the Petition should be granted, an order first should be made for discovery, a subsequent evidentiary hearing, and determination to the United States District Court for the Eastern District of Wisconsin.

Dated this 30th day of December, 2010.

Respectfully Submitted,

Scott Alan Heimermann
200 South Madison Street
P.O. Box 0351
Waupun, Wisconsin 53963-0351
Tel: 920-324-1156

Petitioner pro se

CERTIFICATE OF GOOD FAITH

I, Scott Alan Heimermann, as an incarcerated individual, hereby certify that I am a party proceeding *pro se*, and that on this 30th day of December 2010, I caused to be filed a Petition for Rehearing. The Petition for Rehearing is presented in good faith and not for delay.

Dated this 30th day of December, 2010.

BY: _____
Scott Alan Heimermann
Petitioner *pro se*

APPENDIX A

No. 10-606

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE SCOTT ALAN HEIMERMANN,

Petitioner

AFFIDAVIT OF SCOTT ALAN HEIMERMANN

STATE OF WISCONSIN)
) SS.
COUNTY OF DODGE)

SCOTT ALAN HEIMERMANN, being duly sworn, deposes and says:

1. My name is Scott Alan Heimermann. I am over 18 years of age. I am an incarcerated individual and currently reside at the Wisconsin state penitentiary located at 200 South Madison Street, P.O. Box 0351, in the City of Waupun, County of Dodge, and State of Wisconsin. I have been incarcerated wrongfully over 19 years. Further, my domicile is the Fort Lauderdale, Florida community where I intend to return to upon my successful release from prison. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts stated in this affidavit are true and correct.

2. I am one of three charged Defendants in the State trial court below and the Petitioner in this original habeas corpus action. I make this affidavit in support of the Petition For Rehearing. (hereinafter "Rehearing Petition").

3. The murder investigation that resulted in the charges in this action began March 7, 1991, some 19 months after the said murders lay dormant. I was arrested at my home in the Fort Lauderdale, Florida community without incident on April 18, 1991. Shortly thereafter, I voluntarily returned to Milwaukee, Wisconsin. I made my initial appearance in the Circuit Court of Milwaukee County on April 23, 1991 and was admitted to bail liberty for $250,000 cash.

4. I was unable to raise the full amount of cash bail and remained confined in the Milwaukee County Jail until trial in December 1991.

5. I was convicted after a mere 2½-day jury trial of two counts of first-degree intentional homicide as party to a crime in the Circuit Court for Milwaukee County, Wisconsin, on December 12, 1991. On February 25, 1992, I was sentenced to consecutive life sentences.

6. The underling facts of the case as presented by the State at your Affiant's trial are set out in the Wisconsin Court of Appeals' unpublished opinion on direct appeal. *See* ***State v. Heimermann***, Case No. 1995AP225, 1995 Wisc. App. LEXIS 967 (Wis. Ct. App. Aug. 8, 1995). The State charged your Affiant as a party to the crime with Edward J. Piscitello and Joseph Isajiw. The two victims of the homicide were Mohammad Binwalee, known as "T.C.," and his bodyguard named Dion Russell. On August 19, 1989, Binwalee and Russell were shot and killed by Piscitello and Isajiw and buried in

the basement of 941 South 35th Street in South Milwaukee where Piscitello and your Affiant lived.

A. CHRONOLOGY OF EVENTS LEADING TO THESE CONVICTIONS.

After nearly 20 years, we now know much more about both what led to and what actually happened in the murders of Buwalee and Russell, and the lengths Milwaukee law enforcement and prosecutors went to in order to secure convictions against me.

All of the following information was known to Milwaukee law enforcement before, during, and immediately after the murders, and became known to prosecutors via law enforcement and/or Edward J. Piscitello.

This case stems from Milwaukee law enforcement's use of Edward J. Piscitello as a seasoned confidential informant in their war on drugs in the Milwaukee area. Milwaukee Police Detective Barry Debraska Jr. and Thomas Gorecki became Piscitello's handlers in October 1988 through March of 1991, (Petition App. 91a,¶1;111a,¶4),[1] utilizing Piscitello primarily to investigate Mohammad Buwalee and Dion Russell, the Black Gangster Disciples and associates for their drug activity in the Milwaukee area.

Piscitello's confidential informant work was not isolated to just Milwaukee law enforcement agencies, as he worked with Washington County (Wisconsin) law enforcement against the Outlaw Motorcycle Gang and other state agencies against numerous, prominent criminals (Petition App. 92a,¶4.)

Detective Debraska and Gorecki brought Piscitello into their investigations as Buwalee was a member of the Black Gangster Disciples street gang, and was an active

[1] Your Affiant uses "Petition App. ___" when he refers to a page in the Appendix of his Petition for Extraordinary Writ of Habeas Corpus ("Petition").

drug dealer and wanted murderer from the geographical areas of Chicago and Milwaukee. (Petition App. 103a,¶7.)

In the time before, during, and immediately after the Binwalee/Russell murders, Piscitello had a hand in the development of prosecutions against some 22 people associated with Binwalee and Russell, as well as Milwaukee's narcotics underworld. (Petition App. 129a-131,¶28.)

Piscitello's undercover role became so involved and successful, Debraska et al. recklessly disregarded the fact that Binwalee was specifically wanted by Cook County Illinois and the FBI for the July 2, 1988 Chicago gangland slaying of David Curry. (Petition App. 28a-32a;104a,¶7.) Debraska did this despite the fact that Binwalee was arrested for "battery on 03-21-1989," and such a charge "was dismissed according to court records." (Petition App. 26a.) Though Binwalee was arrested under an assumed name, Anthony C. Bryant, such an alias was known by the FBI and Chicago law enforcement and highlighted in their warrant bulletins. (Petition App. 26a; 28a, *see* foldout bulletin.)

Moreover, Binwalee's girlfriend gave a statement to Milwaukee police on April 2, 1991. She stated that she and Binwalee had moved from Chicago to Milwaukee in January 1989 "due to the fact that he [Binwalee] was wanted for the homicide in Chicago." (Petition App. 35a.) She also gave a detailed description of Binwalee and Russell moving into an apartment building at 2445 West Wisconsin Avenue in Milwaukee, to engage in the drug trafficking profession. (Petition App. 36a-38a.) Piscitello was also living at the same apartment building as Binwalee at the time, but Piscitello was living at 2445 West Wisconsin Avenue because he was facilitating a law

enforcement drug investigation into Binwalee and his organization in the war on drugs. (Petition App. 39a-42a.)

In mid-April 1989, Piscitello initiated contact with your Affiant and lured me to work on some real estate deals in Milwaukee, including the apartment building at 2445 West Wisconsin Avenue. (Petition at 3-4; App. 112a,¶7.) Importantly, Piscitello avers that, "at no time did my law enforcement handlers deem Mr. Heimermann to have been involved in any criminal activity surrounding these April 1989 events." (Petition App. 112a,¶7.) During the contacts with Piscitello, your Affiant ended up becoming acquainted with Binwalee and Russell, setting up a series of events which eventually led to me witnessing their deaths on August 19, 1989.

Debraska et al. further overlooked and disregarded Binwalee's fugitive status up to several weeks prior to the August 19, 1989 double homicide, as "Mr. Binwalee had been arrested [again!] by Milwaukee police on a traffic violation, and later after Detective Debraska learned of Mr. Binwalee's arrest, he [Debraska] cut a deal and let him back on the street [again!] in order for us [Debraska et al. and Piscitello] to tail him to see what else he would be up to." (Petition App. 115a,¶10.)

During the course of seeing, "what else he [Binwalee] would be up to," Binwalee sold Piscitello and Isajiw cocaine on a couple of occasions, selling them under-weighed quantities at heightened prices. (Petition App. 92a-93a,¶6; 115a,¶11; 199a,¶6.) So ingratiated was Piscitello in these investigations in his undercover role, Joseph Isajiw had expressed his desire to murder Binwalee for being "shorted" on these cocaine purchases.

Piscitello notified Debraska of these threats, but Debraska disregarded such reports, indicating that "just knowing that Mr. Isajiw would attempt to kill Mr. Binwalee

was not good enough ..." "that Mr. Isajiw's threats were not genuine ..." and that "acting on them only ended up paralyzing the ongoing drug activity investigations." (Petition App. 92a-93a,¶6; 115a-116a,¶11.) Thus, the Binwalee murder appeared imminent; Debraska et al. did nothing to stop it.

Further warning of imminent danger surrounding Piscitello's investigations was about Piscitello himself, which came from your Affiant when he called the Milwaukee Police Department around this time-line during July of 1989, specifically warning them of Piscitello's ongoing violent tendencies. However, such concerns and warnings given by me went unnoticed and disregarded. Less than a month after your Affiant's warnings on August 19, Piscitello and Isajiw shot and killed Binwalee and Russell at 941 South 35th Street. Oddly enough, the employer for Piscitello during this time-line was the Milwaukee Police Department. (Petition App. 104a-105a,¶¶8-9, 107a,¶11.)

Therefore, had Debraska et al. not released Binwalee from jail not once ... but twice for the war on drugs, and had Debraska et al. not prioritized their drug investigations over the general safety of the public -- considering Binwalee *was* on the FBI's 10 most wanted calendar since June of 1989, and had an arrest warrant out of Cook County, Illinois, since July 3, 1988 (Petition App. 28a; 31a) -- it is more than reasonable to say that Binwalee was a public safety risk Debraska et al. ignored, not to mention Piscitello's direct reports of threats on Binwalee's life by Isajiw which went unheeded, there would have been no August 19, 1989 murders and your Affiant wouldn't have spent some 20 years wrongfully imprisoned.

Unfortunately, August 19, 1989 did happen and Mohammad Binwalee and Dion Russell were shot and killed and entombed in the basement flooring of the residence at 941 South 35th Street, where Piscitello and your Affiant resided.

In the days preceding the murders, however, Piscitello and Isajiw met together to discuss the actual murder intentions and plans, with Isajiw even engaging his brother Nicholas about their intentions "to kill that nigger ["T.C."] due to T.C. ripping him [Joe] off on several cocaine purchases." (Petition App. 104a,¶8; 105a,¶9;199a-200a,¶¶6-7.)

On the day of the murders, your Affiant was along with Piscitello to view real estate and engage in the type of rapport which might lead to additional real estate deals. (Petition at 3-4.) Unfortunately, Piscitello and Isajiw instead had the intent of killing Binwalee and Russell.

At no time during the discussions of these murder plans did your Affiant participate, agree, or acquiesce, and had no actual knowledge that it was the intent of Isajiw and Piscitello to murder Binwalee and Russell on the night in question, which is consistent with my statements to police and testimony at trial.. (Petition App. 104a-106a,¶¶8-9.)

After the murders, Isajiw phoned "his brother Nicholas, in Chilton, from the 941 South 35th Street residence, where Joe asked his brother Nicholas about 'wrapping the bodies.'" (Petition App. 115a-116a,¶9.) The bodies were subsequently [wrapped] and buried in the basement of the residence by Piscitello and Isajiw.

Piscitello himself, moreover, contacted Detective Debraska immediately after the murders, and "told him that a double homicide had just occurred at the 941 South 35th

Street residence, and that Joseph Isajiw had in fact shot and killed Binwalee and his companion Dion Russell."(Petition App. 93a,¶7; 106a,¶11; 116a,¶12.)

Indeed, Piscitello advised Debraska that he had nothing to do with the murders and in no way acquiesced in them, (Petition App. 116a,¶12), and made recommendations to Debraska about how to deal with reporting the shootings so as to preserve the integrity of their drug investigations, (Petition App. 93a,¶7), but Debraska had other intentions, replying that "he did not want to report the shootings, and that [Piscitello] should see that the matter be kept quiet for now and the bodies be disposed of." *Id.* Debraska even went one step further, making it clear to Piscitello that if he "had any problem with that, that he [Debraska] would see to it that I [Piscitello] would be charged in the murders." *Id.*

Piscitello later called Debraska a second time that night "from 'O'Connors Pub' located on East Wells Street ... Detective Debraska returned my [Piscitello's] call and again directed that I [Piscitello] dispose of the bodies and reiterated that he did not intend to report the shootings ... at least for the time being." (Petition App. 93a,¶7, 106a,¶11.)

This information of Piscitello is independently documented in a June 19, 1996, letter to Milwaukee Police Chief Phillip Arreola, from U.S. Customs Special Agent Buford E. Gates, *see* Petition App. 165a. Agent Gates stated: ("I suspect it was to Debraska. Maybe Debraska started to get concerned with [REDACTED] [Piscitello] involvement himself or he had covered it up himself. I really don't believe that but it is far more likely than what he chose to allege against me. It was an MPD officer that [REDACTED] [Piscitello] old (sic) about the bodies buried in the basement according to our investigators report). Again, according to that report, [REDACTED] [Piscitello]

apparently first told Debraska (?) too that he KNEW something about the murders, not that he did them." (Petition App. 165a, ¶2.)

Piscitello later provided your Affiant with items to pawn, indicating that they were his and were passed down from his family to him and that he needed the money. Your Affiant pawned the items because Piscitello said that he did not have any proper identification and because your Affiant already had a *legitimate* account with Stein Jewelers in Milwaukee since March of 1989. It wasn't until that time that Piscitello told me that the items were taken from Binwalee and Russell, and that he did this to implicate me in the murders as a form of insurance against my reporting the murders to police, (Petition App. 105a,¶8; 122a,¶17), and threatened to kill me and/or members of my family if I did. (Petition at 5,n.1.)

On August 19, 1989, my only relationship to the murders of Binwalee and Russell was being at the scene of the crime, (Petition App. 121a,¶17), and not reporting the murders – though at the time I had every reason to believe that Piscitello and his 'family contacts'[2] in law enforcement (as he represented to me) whom he 'did things for' and so feared that I would be killed or framed for the murders myself.

A short time after the murders, your Affiant relocated to Fort Lauderdale, Florida, in an attempt to piece his life back together in September 1989, continuing his real estate investing interests.

Your Affiant lost and then abandoned all contact with Isajiw after the Christmas Holiday of 1989, when Piscitello traveled to his parents home with other unknown parties, reminding your Affiant that he could make good on his threats of harm should I

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[2] *See* Petition at 4-5.

report the murders. (Petition at 5, n.1.) From that point, though Piscitello constantly initiated contact with me in Florida on subsequent occasions, such contact was shirked by your Affiant as best as I could.

Sometime after losing contact with Piscitello, Piscitello continued to work with law enforcement agents. Specifically, through November 18, 1990, Piscitello worked with both Detectives Barry Debraska of the Milwaukee Police Department and Agent Jack Hein of the Northern Kentucky Drug Task Force. (Petition App. 162a-163a.) In this investigation, Debraska was specifically targeting a Robert Theno of Milwaukee through Piscitello. (Petition App. 162a, ¶3; 163a¶2.)

Further, on December 27, 1990, Piscitello was introduced to Customs Agent Buford E. Gates, to continue his cooperation and work for federal law enforcement. (Petition App. 162a, ¶4.)

On January 15, 1991, Piscitello met with Washington County Detectives Robert Miotke, Mark Jansen, and IRS Special Agent Michael Spang for an interview regarding Piscitello's undercover work in another investigation about his knowledge of the Outlaws Motorcycle Gang. During that interview, another of Piscitello's federal handlers, Spang, reported that Piscitello confessed that *he* committed Binwalee's and Russell's murders along with a "second person" [Isajiw] -- with no mention at all of a third person. (Petition App. 81a, ¶¶1-3; 94a,¶7; 95a,¶10.) That account would be reported repeatedly with minor variations in every single document the Milwaukee law enforcement had before Piscitello's March 7, 1991 tale. (Petition App. 172a,¶¶3,6; 50a-55a.) Moreover, as of that January 15 meeting Agent Spang advised Piscitello how he thought Piscitello should proceed. (Petition App. 82a,¶3.) Piscitello further details their conversation, where Spang

informed Piscitello that he would speak to Debraska about why the murders had not been reported (Petition App. 94a,¶9; 119a,¶13.) In other words, as an October 11, 1994 Customs Internal Affairs report confirms, there is no reason why the Milwaukee Police Department "weren't aware of the homcides actually having occurred" before March 7, 1991. (Petition App. 58a.) That is because Piscitello reportedly told Milwaukee Police Department officers in "late 1990 or early 1991" of the August 19, 1989 murders. (Petition App. 172a,¶6.)

After a second meeting between Spang and Piscitello, where Piscitello provided Spang with "documents pertaining to the Outlaws Club Meeting (Minutes) Agent Spang and myself [Piscitello] had an agreement in words that he would make sure that I [Piscitello] was okay, but that it would have to be done by someone else because he couldn't handle it." (Petition App. 95a,¶11.)

Though Piscitello had confessed about the murders to Special Agent Spang on January 15, 1991, and had told Spang of Debraska's knowledge of these murders, Piscitello may not have informed Debraska about his January confession to Spang, proceeding in his undercover capacity and negotiating his way in his relationship with them to concertedly bring the murders to light, all the while talking to Spang about Debraska's position on reporting them to obtain perspective and reassure himself that following Debraska's lead was the right thing to do. (Petition App. 96a, ¶12.)

At the same time – and this should have been significant – Spang did not immediately relay that Piscitello had been one of the Binwalee and Russell murderers to competent authorities. According to a June 19, 1996 letter to Milwaukee Police Chief Philip Arreola, from U.S. Customs Agent Buford E. Gates, Spang apparently told

Customs Internal Affairs investigators in 1995 that he "sat on" Piscitello's confession in the August 19, 1989 murders until he wrote to the Milwaukee County DA's office on April 21, 1991 because he "didn't believe" that Piscitello had been one of the murderers. (Petition App. 163a, ¶1; 169a, ¶2.) The facts suggest otherwise. Spang's April 21, 1991 Memo, Petition App. 82a-83a, to Jon N. Reddin of the Milwaukee County DA's office, says "reliable" and "immunity." It is inconceivable that a *seasoned* federal law enforcement officer would first find details of a *career* informant's information "reliable"; he acknowledged that after he heard all of the facts about a double murder, he subsequently discussed with Piscitello "immunity," that Spang didn't believe that Piscitello was not involved in a double murder? Thus, Spang clearly "believed" Piscitello's detailed information about a double homicide regarding his "killing two 'BOS' gang members" to be "reliable" enough that compelled Spang to talk about "immunity." (Petition App. 81a-82a.)

As the following chronology will illustrate, Spang's rationale for not immediately bringing the homicides to light was centered upon the continuing confidential informant's work both Spang and Debraska wanted from Piscitello and not, in fact, because Spang "didn't believe" that Piscitello had been one of the Binwalee and Russell murderers. Indeed, informant's work whose credibility is not impeccable is not passed around from agency to agency to penetrate extremely violent and dangerous motor-cycle gangs such as the Outlaws, to later be relied upon as a witness for prosecuting the very crimes he was sent in to discover, if he cannot be "believed." In effect, then, Spang plainly was in a position to believe that Piscitello had in fact been one of the Binwalee and Russell murderers as early as January 15, 1991, but Spang and Debraska reached a joint

agreement to continue to turn a blind eye to the said murders so that penetration of Piscitello as an informant in the Outlaws motor-cycle gang and other criminal organizations could go forward. (Petition App. 81a; 95a, ¶¶10-11.) It was only after Piscitello threatened to go to the Milwaukee Journal/Sentinel about the cover up of the murders that there was any chance of making them public, *see infra*. (Petition App. 119a-120a, ¶14.)

Meanwhile, Piscitello continued working undercover for both Spang and Detective Debraska. (Petition App. 96a,¶11.) While working undercover for both Debraska and Spang, Piscitello continued to advocate reporting the double homicide. Both Debraska and Spang advised Piscitello that the murders could not be reported or surface until the Adonis, Theno and Isajiw investigations could be successfully completed. (Petition App. 97a,¶15.) Agent Spang further told Piscitello that the "reason Debraska never reported the 1989 double homicides was due to his ongoing investigations" and that Spang agreed "with Detective Debraska's assessments." (Petition App. 96a,¶13.)

Piscitello finally grew doubtful of Spang's and Debraska's honestly in their representations to him regarding reporting the murders, and so elected to notify Debraska that he revealed the details of the homicides to Agent Spang. After that both Spang and Debraska assured Piscitello in concert that the homicides would soon become known. (Petition App. 97a,¶15.)

Once Piscitello grew tired of Spang's and Debraska's empty assurances, he told both Spang and Debraska that he [Piscitello] intended to bring the homicides to "light via other law enforcement." (Petition App. 97a-98a,¶17.) Piscitello went so far as to contact

Detective Barry Debraska and, tell him that Piscitello "was entertaining thoughts to go to the Milwaukee Journal Sentinel with the occurrences surrounding the August 19, 1989 shootings." (Petition App. 119a-120a,¶14.)

It wasn't until this unequivocal declaration by Piscitello that Debraska decided to assist in bringing these homicides to light on March 7, 1991. Debraska made arrangements for Piscitello to go to Milwaukee police headquarters, to meet with Debraska, "Milwaukee Police Detectives Brian O'Keefe, Vincent Vitale, Ronald Castillo, Paul Stuhmer and Milwaukee County Deputy District Attorney Robert D. Donohoo for purposes of approving the resolution of bringing to light the occurrences of August 19, 1989." (Petition App. 120a,¶14.)

Initially, Detective Debraska and Piscitello met with Detectives Ronald Castillo and Brian O'Keefe where Piscitello had confessed to the murders of Binwalee and Russell. (Petition App. 107a,¶11.) After this initial "confession," Piscitello later met with other detectives (Paul Stuhmer and Vincent Vitale) and Deputy District Attorney Robert D. Donohoo whereby Piscitello recounted his confession to detectives O'Keefe and Castillo, (Petition App. 102a,¶6; 104a-105a,¶8-9; 107a,¶11; 120a,¶15; 123a,¶20), giving "the location of the bodies, and the vivid facts of the crime" itself. (Petition App 120a,¶6.)

Piscitello provided Donohoo and company with a detailed account of his role in Debraska's and Gorecki's drug investigations against Binwalee during the homicides, (Petition App. 103a,¶7), and how it was your Affiant was involved in these homicides ... that is to say that your Affiant had no involvement at all, as Piscitello clearly informed the prosecutors and police. (Petition App. 104a-105a,¶8.)

Further, at this informal March 7, 1991 meeting, Piscitello requested a "non-prosecution agreement," where "Milwaukee Senior Deputy District Attorney Robert D. Donohoo, and other Milwaukee officials granted my [Piscitello's] request and agreed not to prosecute me [Piscitello] for [his] own role ..." (Petition App. 102a,¶6.) In return, Piscitello agreed "to testify live for Donohoo at the March 8, 1991 search warrant proceeding where I [Piscitello] was Donohoo's chief eyewitness." (Petition App. 102a-103a,¶6.)

Also at this March 7, 1991 meeting, it was discussed and established between the Milwaukee officials and Piscitello that they "would use the testimony of Mr. Heimermann to ensure the smooth prosecution of the August 19, 1989 shootings against Joseph Isajiw, and that way no one would have knowledge of my [Piscitello's] undercover role in the days leading up to those shootings, or have knowlege [sic] of the 1989 drug activity investigations themselves ... that I [Piscitello] would not be prosecuted ... and that I [Piscitello] would be placed in Witness Protection ..." (Petition App. 120a,¶15.)

In other words, Donohoo, Piscitello and company hatched a plan to prosecute Joseph Isajiw for the murders by utilizing your Affiant's testimony so as to preserve the integrity of the drug investigations Debraska and Gorecki utilized Piscitello for against Binwalee and his organization in 1989.

On March 8, 1991, Piscitello "appeared with Deputy D.A. Donohoo and Detective O'Keefe in the Chambers of the Honorable Audrey Y. Brooks, Milwaukee County Court Commissioner," with "Detective Debraska as proxy," secretly convened to obtain a search warrant for the 941 South 35th Street residence to search for the bodies to

Binwalee and Russell so as to obtain an arrest warrant for Joseph Isajiw in preparation for his prosecution, and an arrest warrant for your Affiant so as to garner my cooperation in their scheme to cover up Piscitello's undercover activities and Milwaukee law enforcement's ineptness in causing the murders. (Petition App. 98a,¶18; 120a-121a,¶16.) Piscitello described the proceedings as being "rigged to such an extent they were a proceeding in name only" (Petition App. 98a,¶18), as such testimony was to "'cover' for Detective Debraska and other Milwaukee Officials' knowledge and liability in the murders." (Petition App. 107a,¶12.)

At this March 8, 1991 search warrant hearing, Donohoo presented two witnesses: Detective O'Keefe and a confidential informant, identified as "It," later self-identified as Piscitello. Donohoo specifically requested Piscitello's name remain confidential. (Petition App. 58a.) Detective O'Keefe provided brief testimony, and then swore to the reliability of Piscitello's credibility. (Petition App. 50a.)

After establishing Piscitello's credibility as a career informant for the Milwaukee law enforcement community, Piscitello was called to the stand and asked a series of questions regarding the 941 South 35th Street residence on the evening of August 19, 1989. (Petition App. 50a-51a.)

Piscitello testified that "eight, nine, give or take" other people were at the residence that evening, without being specific as to any of their identities. (Petition App. 51a.) In addition, while Piscitello did name your Affiant as being a mere bystander at the scene of the crime he did not implicate me in the homicides. (Petition App. at 54a-55a; 121a,¶17.)

Donohoo carry's his questioning on with Piscitello about the bodies in the basement, what Piscitello saw, how he thought the men were killed etc. (Petition App. 51a-53a.)

It is now that Donohoo and Piscitello were perpetrating a fraud on the court as Piscitello did not happen upon any of this information as he was an express participant in the abstract picture Donohoo was attempting to paint to gain the search warrant. (Petition App. 51a-55a.) Donohoo specifically knew that Piscitello was lying through his teeth at this hearing as he heard already Piscitello's full confession the day before, that there were only five people at the residence the night of the murders: Your Affiant, Isajiw, Piscitello and the victims, Binwalee and Russell, that the murders were planned by Isajiw and Piscitello etc.

After Donohoo finished with Piscitello's testimony, O'Keefe was called back to the stand to give other extraneous information. (Petition App. 56a-60a.) Of specific note, O'Keefe was asked by Milwaukee County Court Commissioner Audrey Y. Brooks:

> "Q: Detective , if I understand this testimony correctly, these allegations – or the allegations of these offenses took place in August of 1989. Has there been a continuing investigation? What brought this information to light now in March of 1991?
>
> A: The Affiant brought the information. We weren't aware of the homicides having actually occurred.
>
> Q: So you received information with the last 72 hours that caused the investigation to become ongoing, is that right?
>
> A: That's correct."

(Petition App. 58a.)

It is, of course, redundant at this stage of the affidavit to itinerate in every regard how it is O'Keefe's testimony is purely false, and that Donohoo was suborning perjury upon the court through Piscitello and O'Keefe's testimony. At that stage, there was nothing to investigate about the homicides as the Milwaukee police *already knew* precisely how and when the homicides were committed; they had documented them through their earlier drug investigations against Binwalee and his organization on that fateful night in August of 1989.

Donohoo's smokescreen worked, however, and a search warrant was issued for the 941 South 35th Street residence, where the bodies of Binwalee and Russell were "found," and Piscitello's March 7, 1991 confessions were verified.

The search warrant was returned and the bodies of Binwalee and Russell were recovered on March 8, 1991. (Petition App. 60a; 98a,¶19 .)

On March 13, 1991, "Mr. Donohoo and Milwaukee County then-Assistant District Attorney Jon N. Reddin prepared statements and affidavits for me [Piscitello] to sign," as part of the negotiated non-prosecution agreement for Piscitello regarding his role in the August 19, 1989 homicides, and in preparation for his placement in witness protection. (Petition App. 122a-123a,¶19; 124a,¶21.)

Piscitello was then administered a polygraph examination at the behest of both Donohoo and Reddin, where it was "determined by a polygraphist from the Milwaukee County D.A.'s Office that my [Piscitello's] information provided up to this point was truthful, (Petition App. 103a,¶6), such solicitation being done in "order to sustain my [Piscitello's] veracity of the truth as to my allegations relating to the 1989 double homicides and events to date." (Petition App. 98a,¶19.) These polygraph test results were

forwarded by Polygraphist Richard Heath to Donohoo and Reddin "along with a report stating that the analysis of my [Piscitello's] polygraphs indicated no attempted deception of the relevant questions." (*Id.*) Donohoo and Reddin assured Piscitello that the results would be admissible in a court of law if necessary, for credibility purposes and that Piscitello would no longer be needed for future court appearances. (Petition App. 99a,¶19; 123a,¶20.)

Being satisfied with Piscitello's performance at the search warrant proceedings and later polygraph screening, concerns for Piscitello's safety due to his cooperation compelled Donohoo and Reddin to arrange for Piscitello's placement in witness protection, where he was provided "a large amount of money" and was then flown to Arizona from Milwaukee Mitchell Airport under the "assumed name, Joe Connors," and assured he would never have to return to Milwaukee again. (Petition App.99a,¶19; 122a,¶19; 125a,¶22.)

Once the search warrant was returned, the bodies uncovered, and the polygraph results indicated that Piscitello told Donohoo et al. the truth about what happened the evening of the August 19, 1989, which confirmed that your Affiant was *not* a participant in those murders at any stage, (Petition App. 54a-55a; 104a,¶8; 121a,¶17), and Piscitello was flown to Arizona, Donohoo and Reddin had to then secure your Affiant's testimony against Joseph Isajiw in order to ensure that "no one would have knowledge of my [Piscitello's] undercover role in the days leading up to those shootings, or have knowledge [sic] of the 1989 drug investigations themselves." (Petition App. 120a,¶15.)

On March 14, 1991, Detectives Brian O'Keefe and Paul Stuhmer contacted U.S. Customs Special Agent Buford E. Gates to inquire as to what Gates may know about

Edward J. Piscitello, Robert Theno, and your Affiant. They specifically wanted to know "what, if any admissions were made by Ed Piscitello regarding his role in the subject murders." (Petition App. 133a; 164a, ¶2; *see also* Exhibit 3 at 1 annexed hereto.)

Agent Gates gave Stuhmer and O'Keefe ready access to his files and he documented such "disclosure on Customs Form 191 in accordance with" Customs guidelines. (Petition App. 133a.)

Detectives Stuhmer and O'Keefe were allowed to "copy any documents relating to [redacted] that did not contain other investigative material irrelevant to their investigation." (Petition App. 146a.) There were "no admissions or confessions from Mr. Piscitello or anyone else regarding the murders." (Petition App. 133a.) Gates also provided Stuhmer and O'Keefe with the last known information Gates had for your Affiant – which O'Keefe and Vitale would later use to locate your Affiant on March 25, 1991. (Petition App. 133a; *see also* Ex. 3 at 1.)

On March 16, 1991, at the behest of Reddin, Milwaukee Detective Ronald Castillo arranged with a Robert Theno to call and make contact with your Affiant in Florida. The phone call was placed, contact was made, and eventually Castillo got on the line, identified himself and his interest in speaking about the two bodies suddenly 'found' in the basement at 941 South 35th Street. Your Affiant asked Castillo how he "wanted to deal with this, over the phone or come on up there." (*See* Exhibit 1 at 1 annexed hereto.) Castillo and your Affiant then spoke about my coming up to Milwaukee and your Affiant eventually agreed to cooperate.

After this initial contact, Reddin and Castillo discussed the option of flying your Affiant to Milwaukee and determined to make those flight arrangements. Castillo then

called your Affiant later that same day to inform me of the flight arrangements, and your Affiant verified that I would be there. (*See* Ex. 1 at 2.)

Later on that same day, March 16, 1991, your Affiant phoned Castillo to inform him that your Affiant could *not* conclude my real estate business meetings in Florida on time to make the flight to Milwaukee as planned. Castillo was not available, and so your Affiant left a message with Milwaukee Detective Lieutenant Raymond Sucik, requesting that Sucik have Castillo contact me.

All of this information was passed on to Reddin and presumably Donohoo. (*See* Ex. 1 at 3.)

Your Affiant again called Castillo in March 17, 1991, but again he was unavailable, being informed that Castillo would not return to work until March 18, 1991. (*See* Ex. 1 at 3.)

On or about March 23, 1991, Milwaukee Detectives Brian O'Keefe and Vincent Vitale traveled to Sarasota Florida to interview Joanne Danbrova, whom they had learned was privy to information regarding the victims in this case and was an associate of your Affiant, Piscitello, and Joseph Isajiw throughout their investigation.

Joanne Danbrova was not initially home, but later the Sarasota County Sheriff's Department was contacted when Danbrova returned home and subsequently arrested her for an "outstanding warrant from the Metro Dade Police Department." (*See* Exhibit 2 at 1 annexed hereto.) O'Keefe and Vitale were then contacted related to this development, and they proceeded to interview her. (Ex. 2 at 1-6.)

Subsequent to their Danbrova interview, O'Keefe and Vitale proceeded to contact me at my home, to conduct an interview based on this investigation. After

locating my interim residence in Plantation Florida (as noted above, your Affiant had just sold his Ocean front condo in Pompano Beach Florida and so I had been staying with some friends in Plantation until I closed on my next Ocean front condo purchase in Pompano Beach, *see supra* at 3), O'Keefe and Vitale asked your Affiant to accompany them to the Davie police station for the interview, to which I cooperated. (*See* Exhibit 3 at 1-7 annexed hereto.)

Initially, your Affiant was not forthcoming with information and very selective in my answers to their questions as, at that time your Affiant was not certain that either detective was not one of Piscitello's 'family contacts.' (Petition at 4-5.)

Once Milwaukee law enforcement attempted to lure your Affiant back to Milwaukee failed, (Petition App. 116a-117a,¶12), a "new tactic developed: amid the cacophony of information provided by me [Piscitello] with respect to the true occurrences surrounding the August 19, 1989 shootings, Mr. Domohoo [sic] and Mr. Reddin" ... had to ... "fine-tune the proposed prosecution against Joseph Isajiw for the said shootings; the earlier tactic of having Mr. Heimermann testify against Mr. Isajiw was not working out as these officials had quite anticipated." (Petition App. 125a,¶23.) Your Affiant did not fly to Milwaukee, Joseph Isajiw could not be located, and the prospect of preserving what was left of the integrity and secrecy of Piscitello's investigations with Detective Debraska et al. during the murders was fading fast.

Donohoo and Reddin, therefore, were compelled to initiate arrest warrant proceedings against Joseph Isajiw, Edward J. Piscitello, and your Affiant for the August 19, 1989 homicides on April 15, 1991.

Detective Brian O'Keefe told Piscitello that, "because Heimermann had now made statements to the police touting me [Piscitello] as a direct participant in the murders ... that the police now needed to bring me [Piscitello] in from witness protection and try out a particular way to see if they could strike the right tone for Mr. Heimermann's cooperation in the prosecution against Mr. Isajiw in the August 19, 1989 murders." (Petition App. 117a,¶12;125a,¶23.) The arrest warrant proceedings were the cover under which Donohoo and Reddin employed this ruse to compel Heimermann's cooperation in the Isajiw prosecution. (Petition App. 125a-127a,¶24.)

The arrest warrant proceedings were held at 4:30 p.m. on April 15, 1991 in secret again before Milwaukee County Court Commissioner Audrey Y. Brooks -- whom presided over the search warrant proceedings and was already familiar with the case – with Milwaukee County Assistant District Attorney Jon N. Reddin representing the State of Wisconsin. (Petition App. 61a-69a.)

At this secret hearing, Reddin presented the sole testimony of Detective Brian O'Keefe.

O'Keefe provided the 'alleged' accounts of his interview with Joanne Danbrova of March 23, 1991 at the Sarasota County Sheriff's Department. O'Keefe alleged in his accountings that Joanne Danbrova *and* Christine Schroeder were in the 941 South 35th Street residence on the night and at the time of the murders, that they heard the gunshots which, invariably, he represented as the shots fatal to both Binwalee and Russell, and that she [Danbrova] informed him [O'Keefe] that on that same evening prior to the murders, she overheard your Affiant, Isajiw and Piscitello conversing about how to kill Binwalee ["T.C."] and his bodyguard [Russell]. (Petition App. 63a-64a.)

Though incarcerated at the time Danbrova made these statements to O'Keefe and incarcerated as late as 8:30 p.m. on March 27, 1991 for the "drug related charges" (Petition App. 210a), O'Keefe testified that on that morning or early afternoon of April 15, 1991, Danbrova supposedly "called him" to clarify her March 23, 1991 statements that "she believes T.C, may have left the residence" that night she heard the gunshots, "but she can't be sure of this ..." (Petition App. 64a-65a), to re-emphasize the theory that "she couldn't be sure. She wasn't sure he left. It may have been just because she was told they left." (*Id.*)

However, everything about the testimony elicited by Reddin from O'Keefe at the arrest warrant hearing was illusory as the truth of the matter is Danbrova was *not* present during the commission of the homicides.

Such testimony by O'Keefe would be a deliberate fabrication both as to Danbrova calling O'Keefe on the day of the April 15 arrest warrant hearing; to O'Keefe's testifying that Danbrova called him to clarify her March 23 statement to him and Vitale, explaining that "she [Danbrova] couldn't be sure" that Binwalee and Russell left on the night in question; and to the extent that O'Keefe also testified that Danbrova was told Binwalee and Russell left that night by "Ed, Scott, and Joe," finding that as the reason for Danbrova to say what she did in her March 23 statement.

First, at trial, Danbrova's testimony was unequivocal, she testified on direct examination that her initial statement to police on March 23 was to a point that she *did* see Binwalee and Russell leave South 35th Street on the evening in question (Trial

Transcript, Dec. 10, 1991 at 73-74)[3] and never stated that what she saw on that night decreased by the time of the arrest warrant hearing on April 15. For example, Danbrova's March 23 statement (the initial one) given to O'Keefe and Vitale, states that Danbrova "thinks T.C left the residence and she believes she may have seen this" (*See* Exhibit 2 at p.3.) Moreover, in her April 17, 1991 statement (the second one), Danbrova states that "she assumed they [Binwalee and Russell] did leave" on the night in question. (Exhibit 4 at p.2.) This is a far cry from O'Keefe testifying that Danbrova called him on April 15 to "clarify" that "she couldn't be sure" that Binwalee and Russell left the 941 South 35th Street residence on the night in question. Second, O'Keefe's testimony that Danbrova was told Binwalee and Russell left the residence by "Ed, Scott, and Joe" doesn't square with other aspects of Danbrova's April 17 statement, namely that "[d]uring conversation with Christine, Christine told her that Eddie, Scott and Joe were planning to kill T.C. She related that she did not hear this from the three subjects but she did hear it from #1 [Christine]" (Exhibit 4 at p.2.) Third, O'Keefe's claim that Danbrova "did call me on today's [April 15] date" is totally refuted by the text of the same credible, contrary police report from Detectives Murphy and Becker. (Exhibit 4 at 1-2.) Specifically, Murphy and Becker claim that they simply were there on April 17 to "re-interview" Danbrova

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[3] Confirming that O'Keefe's "Danbrova" testimony is a clear showing that the criminal proceedings were contrived through a deliberate fabrication of evidence by prosecutors and lead homicide detectives in this case, is Reddin's admission during his closing argument: "The women [Joanne Danbrova and Christine Schroeder] who were in the home on the night of the target shooting were *not* in the house on the night of the murder" (Trial Transcript, Dec. 12, 1991 at 40.) Additionally, Reddin's direct examination of Danbrova directly impeaches O'Keefe's testimony at the arrest warrant proceedings: ("Q: Okay. Now, to your knowledge, did T.C. and his bodyguard leave that evening? A: To my knowledge, *yes, they did*, because I had also left to go get cigarettes with Mr Isajiw; *and, when I came back, they were gone.*") (Trial Transcript, Dec. 10, 1991 at 73-74) It again bears noting that these inconsistencies were not known to your Affiant at trial and were not put before the jury because the April 15, 1991 arrest warrant transcript remained sealed at Reddin's request (Petition App. at 69a), and because Reddin failed to disclose the arrest warrant transcript to the defense during pre-trial discovery. (Petition App. at 219a,¶7; Petition at 10-11,34.)

"regarding a previous statement made to Detectives O'Keefe and Vitale" (*Id.* at 1.) Of course, the police report of Murphy and Becker does not mention any other statement given by Danbrova, meaning that the "previous statement" in which Murphy and Becker are referring to is the one Danbrova gave to O'Keefe and Vitale on March 23. In addition, Murphy and Becker never touch on Danbrova calling O'Keefe just 48 hours earlier (on April 15), where Danbrova called to supposedly "clarify" her March 23 statement for O'Keefe. Surely this would have been something significant enough to be referenced by Murphy and Becker in their April 17 report, if Danbrova, in fact, had called O'Keefe on April 17. Regardless, query why Murphy and Becker even needed to "re-interview" Danbrova on April 17, if Danbrova's statement of March 23 had already been "clarified" only 48 hours earlier (April 15) when she called O'Keefe, according to O'Keefe's sworn testimony. (Petition App. 64a-65a.) In sum, neither O'Keefe's April 15, 1991 arrest warrant hearing testimony nor his aforementioned claims regarding Danbrova calling him on April 15, 1991 to "clarify" parts of her initial March 23, 1991 statement are remotely true.

Therefore, by these Milwaukee police reports' own admission (or omission), the Milwaukee prosecuting authorities did not have a prosecutable case against your Affiant until they had deliberately fabricated the factual matters of the arrest warrant hearing, concerning the Danbrova submissions. It was only *after* O'Keefe falsely testified that Danbrova "called" him on the day of the arrest warrant proceeding to "clarify" her March 23, 1991 statement, misled the Court Commissioner into believing that Danbrova was at the residence during the commission of the murders, that Danbrova never saw Binwalee and his body guard leave the residence the night after she heard gun shots in the basement

of the residence, and communicated threats to Binwalee by your Affiant, that the Milwaukee law enforcement and prosecutors were first instrumental in supplying enough information that implicated your Affiant in the murders.[4]

Nevertheless, in support of this "contrived" conclusion, your Affiant reiterates as to what was actually stated *on the record* by the Milwaukee law enforcement and prosecutors *before* they decided to offer that fraudulent information about Danbrova relative to manufacturing the arrest warrant proceedings: the notion that your Affiant was just a bystander in the 941 South 35th Street residence during the two homicides is first supported by Piscitello's testimony at the March 8, 1991 search warrant proceedings. (*See supra* at 16.) Then, on March 13, 1991, after numerous meetings with Milwaukee law enforcement and prosecutors, Piscitello took and passed a polygraph test, in which *again* confirmed that Piscitello did *not* involve your Affiant in the two murders. (*See supra* at 19.) In addition, the 'as-yet-undisclosed-state-evidence' will support the view that from the onset of the night of these murders law enforcement knew through Piscitello that your Affiant was *not* implicated in the shootings. (*See supra* at 7-14.) This supports the view that up to April 15, 1991, no reasonable jury could find that the Milwaukee law enforcement and prosecutors could have reasonably believed that your Affiant was critically involved in the homicides, that is, that Milwaukee law enforcement and prosecutors did not have probable cause to arrest your Affiant at his home in Florida based on that *contrived* April 15, 1991 arrest warrant proceeding.

Also of specific note, Milwaukee Court Commissioner Audrey Y. Brooks, whom oversaw these arrest warrant proceedings, also oversaw the March 8, 1991 search warrant

[4] Again, it bears repeating that prosecutor Reddin denied your Affiant and his attorneys access to this exonerating arrest warrant transcript information for purposes at trial. (Petition App. 69a; 219a,¶7.)

proceedings. At these proceedings, Piscitello specifically "told the Court Commissioner Brooks that I [Piscitello] was present when Joseph Isajiw shot and killed Muhammad Binwalee and Dion Russell and then buried their bodies in the basement. I [Piscitello] also named Mr. Heimermann as simply being present at the shootings ..." (Petition App. 121a,¶17). Though the search warrant transcripts do not particularly contain that language, at every point during Piscitello's questioning at that hearing that specifics related to the actual shooting and participants thereto are mentioned, an "off the record" discussion takes place. (Petition App. 51a,53a.)

Commissioner Brooks, though hearing Piscitello's direct testimony at the search warrant hearing, issued an arrest warrant for your Affiant on April 15, 1991. Brooks further ordered that the arrest warrant transcripts be sealed at the behest of Reddin. (Petition App. 69a.)

As noted above, on April 17, 1991, Detectives Murphy and Becker from the Milwaukee Police Department traveled first to Fort Lauderdale Florida and then to Sarasota Florida to "re-interview" Joanne Danbrova regarding her initial statement given to Detectives O'Keefe and Vitale on March 23, 1991. (*See* Exhibit 4 at 1-3 annexed hereto.)

Then on April 18, 1991, Murphy and Becker traveled back to the Fort Lauderdale Florida area and arrested your Affiant at his home on the contrived arrest warrant issued by Reddin and signed by Brooks. Your Affiant gave a willing statement, waiving *Miranda*, detailing the events of August 19, 1989, and identifying his own role in the homicides as *only* being there, not planning or knowing that the deaths of Binwalee or

Russell were imminent, and taking no part in the commission of the murders or burial of the victims. (Exhibit 5 at 1-7 annexed hereto.)

On April 19, 1991, Piscitello, consistent with his conversations with Detective Barry Debraska (whom he was still working for while in protective custody) (*see* Petition App. 85a-87a), voluntarily returned to Wisconsin to "deal with situation" (Petition App. 86a). Piscitello's "return was only to be temporary, as a pretext to obtaining Mr. Heimermann's assistance in the prosecution against Mr. Isajiw, and without jeopardizing the 1989 drug activity investigations, including my [Piscitello's] role as an undercover governmental informant. Specifically, the police believed that once Mr. Heimermann was assured that I [Piscitello] was in custody, he [your Affiant] would feel safe and then tell his full account to police about Mr. Isajiw's involvement in the shootings" (Petition App. 125a-126a,¶24.)

While still in the Broward County Jail (in Fort Lauderdale Florida) awaiting transfer back to Wisconsin for arraignment in this case, your Affiant contacted Milwaukee Attorney Peter N. Flessas, accepting his offered representation in this matter and advising him of my anticipated arrival in Milwaukee so we could discuss this case. Attorney Flessas became your Affiant's counsel via verbal agreement at that time.

On April 22, 1991, after your Affiant's return to Milwaukee and pending arraignment on these charges, Attorney Flessas attempted to see your Affiant. Milwaukee police personnel informed Flessas that your Affiant did not wish to see him. *This is not true!*

Milwaukee Police Detectives Lieutenant Raymond Sucik, and Captain Joseph Purpero refused to allow Attorney Flessas to see your Affiant or even confirm from your

Affiant that he did not wish to see Flessas, as they had represented. (*See* Exhibit 6 at 1 annexed hereto.) Reddin was made aware of this incident. (*Id*.)

Attorney Flessas filed a formal complaint with the Milwaukee Police Department regarding your Affiant being held 'incommunicado' and Flessas being denied access to his client. No administrative action was taken by Milwaukee Police Chief Arreola, and Attorney Flessas was never notified as to how or in what way his complaint was addressed or resolved. (*See* Exhibit 10 at 16 annexed hereto.)

On April 22, 1991, Joseph Isajiw turned himself into authorities in Milwaukee and gave a statement as to the August 19, 1989 murders. Isajiw's statement, at this time, only implicated your Affiant as knowing of the plan to kill Binwalee and Russell and that he agreed to it. On the same day, Isajiw was requesting special consideration for his "relative" before he would turn the murder weapons over to authorities. (Petition at 8-9.) To your Affiant's knowledge, Isajiw's 'relative' was never charged in this regard and the murder weapons have never been recovered. (Petition at 8.)

On May 15, 1991, the second preliminary hearing was held in this matter. Attorney Peter N. Flessas, Mr. Thomas Hayes (for Joseph Isajiw); and Jill Tan (for Edward J. Piscitello) filed motions to produce the allegedly still-sealed transcript of the search warrant proceedings "to properly prepare for preliminary hearing" as it "might also lead to dismissal of this case." (Petition App. at 70a-80a.) The attorneys relied upon the plain language of Wis. Stat. §§ 968.21[5] and 968.17[6] to justify their argument for the "sealed" transcript.

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[5] Section 968.21, Wis. Stats., states, in relevant part: "A search warrant shall be issued with all practicable secrecy, and the complaint, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way *until the search warrant is executed.*"

What these attorneys apparently did not know was that Brooks' own Court Reporter, Jan Johnson, had already transcribed that March 8, 1991 search warrant hearing just three days after Brooks ordered the transcript sealed. (Petition App. at 60a.)

In other words, Commissioner Brooks' Court Reporter presumably recognized that the plain language of § 968.17 both permitted and required her to produce a transcript of the search warrant proceeding without waiting for a court order.

Despite the plain language of §§ 968.17 and 968.21, Wis. Stats, Commissioner Brooks, at Milwaukee County Assistant District Attorney Karen E. Christensen's insistence, misapplied the statutes meanings and rejected the attorneys' request on the basis that Flessas could not provide the court with "case law" to legitimize the production of a sealed hearing's evidence before trial. (Petition App. at 71a-74a.) Such an erroneous ruling prejudiced your Affiant's ability to assert an outrageous government conduct claim at the preliminary hearing – where such a claim should be raised[7] – and ultimately deprived your Affiant of impeachment evidence at his trial, where such transcripts were never furnished to the defense by the State, despite the fact that after the bind-over Commissioner Brooks granted Flessas' request to have them unsealed, (Petition App. at 78a,80a) and your Affiant's newly appointed trial counsel requested these transcripts before trial. (Petition App. at 219a.)

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[6] Subsection 2 of § 968.17, Wis. Stat., states, in relevant part: ... "An affidavit or complaint made in support of the issuance of the warrant and the *transcript of any testimony taken* shall be filed with the clerk within 5 days after the date of the execution of any search warrant.

[7] *See* ***State v. Steadman***, 152 Wis. 2d 293, 448 N.W. 2d 267 (Wis. Ct. App. 1989) and ***People v. Auld***, 815 P. 2d 956 (Colo. Ct. App. 1991), *cert., denied*, 502 U.S. 1092 (1992). Such a defense is supported by the transcript of the search warrant proceeding in which Piscitello's recantations verifies what to have initiated the factual basis of such a defense, and who Flessas could have called to the stand at the preluminary hearing to confirm such a defense and that Brooks actually was an accomplice to the sham of prosecution officials at the search warrant proceeding. (Petition App. at 50a-55a, 98a¶18,104a, ¶8,112a-113a, ¶¶7-8.)

Of interesting note, though, is how these search warrant transcripts came to be sealed in the first place, contributing to the controversy surrounding them at the preliminary hearing.

The search warrant proceedings took place on March 8, 1991. Commissioner Brooks issued instructions in her order that the "I.D. of the confidential informant not be disclosed. And finally, that when the transcripts is typed, any reference to gender be deleted and the pronoun 'It' be substituted." (Petition App. 59a.) Here, Brooks clearly recognized the statutory meanings of Wis. Stat. §§ 968.17 and 968.21, and their applicability in this case.

On March 11, 1991, however, *after* the search warrant was returned, Reddin quickly filed a request with Brooks to *again* seal the transcripts of the search warrant hearing, (*see* Exhibit 7 at 1-3 annexed hereto), and Brooks *again* sealed the transcripts and everything related thereto, despite *knowing* the exculpatory discovery value to the potential defendant(s) in this case. (Exhibit 8 at 1-2 annexed hereto.)

Such tactic was in furtherance of protecting Piscitello's identity and preserving the integrity of his continuing investigative work for Milwaukee law enforcement, at least up and until his April 19, 1991 arrest.

Commissioner Brooks, after having presided over the search warrant proceedings, therefore, was unwittingly co-opted into playing an active role in the prosecution's misuse of the criminal justice system to wrongfully prosecute your Affiant and in refusing your Affiant's pre-trial and trial access to the transcript of the search warrant proceedings so that your Affiant could adequately challenge the State's witness testimony at the preliminary hearing and the illegality of the prosecution itself.

And even though your Affiant was completely denied access to all exonerating information relating to the search warrant transcripts and other information relating to Piscitello's involvement with law enforcement for Binwalee's and Russell's murders, your Affiant was bound over for trial based upon the perjured testimony of detective O'Keefe, who merely parroted the story from the April 22, 1991 statement of Isajiw, which O'Keefe knew was a false story because Piscitello, a murderer himself and career informant, had repeatedly told MPD so – directly and indirectly – since the onset of the night of the murders. (*See supra* at 7-15.)

Attorney Peter N. Flessas then 'unexpectedly' withdrew as counsel from your Affiant's defense as he did not apparently want to be a part of the continuing stonewalling and injustice being done against me in this case.

Attorney Martin E. Kohler was then appointed as defense counsel. Counsel filed a demand for discovery and inspection. (Petition App. 219a,¶7.) At no time was Attorney Kohler provided a copy of the search warrant transcript of March 8, 1991, the arrest warrant transcript of April 15, 1991, nor any reports, notes, logs or transcripts related to Edward J. Piscitello or his relationships with Milwaukee law enforcement throughout 1989, during that fateful night of the homicides and immediately afterwards.

On December 9, 1991, your Affiant's trial began. Reddin presented the testimony of Detective Vincent Vitale. (Trial Transcript, Dec. 10, 1991 at 26-43.) During this testimony, Reddin continued the charade about the confidential informant – potentially because Piscitello was *still* working for Milwaukee law enforcement despite his prosecution and conviction for the murders in this case. (Trial Transcript, Dec. 10, 1991 at 27-28.) However, upon cross-examination, Attorney Kohler *finally* elicited that

Piscitello is in fact the confidential informant who provided the search warrant hearing testimony. (Trial Transcript, Dec. 10, 1991 at 43.)

From that fact, it can properly be deduced that Piscitello met with authorities on March 7, 1991 to bring the homicides to light, and the post-conviction affidavits Piscitello provided your Affiant find, at least in part, law enforcement verification, as this is the first official declaration of Piscitello being an informant by Milwaukee law enforcement.

Detective Vitale also testified at trial, as O'Keefe did at the search warrant proceedings, that the Milwaukee Police Department "had no knowledge of this homicide at the time Mr. Piscitello was an informant." (Trial Transcript, Dec. 10, 1991 at 43.)

With the evidence provided in the Petition and referenced herein, it is clear as day that Vitale's testimony is fabricated, as Milwaukee Detective Barry Debraska knew of the homicides the night of the murders, *supra*, and other Milwaukee Police Department officers became aware of the homicides in "late 1990 or early 1991" (see Petition App. 172a, ¶6), and in January of 1991. (Petition App. 81a-82a;*see also* Exhibit 9 at 1 annexed hereto.)

Contrary to Reddin's presentation of O'Keefe's testimony at the arrest warrant proceedings, Reddin emphasized that Joanne Danbrova was *not* at the 941 South 35th Street residence on the night of the murders. Specifically, Reddin admitted during his closing argument at trial: "The women [Joanne Danbrova and Christine Schroeder] who were in the house on the night of the target shooting were not in the house on the night of the murder." (Trial Transcript, Dec. 12, 1991 at 40.)

Matter of factly, as noted above, *see* pp. 24-26, all trial testimony provided by Reddin and other evidence regarding Joanne Danbrova's presence at the 941 South 35th Street residence was *not* on the night of the murders, despite the fact such testimony by O'Keefe at the arrest warrant proceedings indicated Danbrova was, and was contrived to legitimize the arrest of your Affiant.

Joseph Isajiw provided key testimony at your Affiant's trial that your Affiant 'knew' of and had 'agreed' to the 'plans' to murder Binwalee and Russell. (Petition at 6-7.)

Based on the above, your Affiant was wrongly convicted of both counts of first-degree intentional homicide as party to a crime and subsequently sentenced to consecutive sentences. (Petition App. 2a,¶2.)

Nor did the Milwaukee law enforcement and prosecutors' intentional misconduct stop after your Affiant was convicted. Your Affiant appealed, first through a series of motions for new trial, then through a series of state and federal habeas corpus petitions, and he sought compassionate release from the Wisconsin parole board, sought clemency from various governors, even appealed to the press. (Petition App. 2a-3a,¶3; 19a; 20a) All of your Affiant's judicial and executive requests for relief which were denied without a hearing or discovery.

On each occasion when the Milwaukee law enforcement and prosecutors could have told the truth – the Milwaukee law enforcement drug investigation complicity in the two homicides and contriving the 1991 criminal proceedings against your Affiant to assure that complicity would not come to light. This was even as more and more evidence surfaced casting more and more doubt on your Affiant's convictions. In the mid-1990s,

for example, as your Affiant began to pull on the thread that threatened to unravel the entire skein, Detectives Barry Debraska and Brian O'Keefe and their confederates began to learn about the assertions your Affiant was making throughout the state and federal appellate proceedings regarding Milwaukee law enforcement's handling of this case, and specifically Debraska et al.'s duplicity and complicity in the murders themselves. (Petition App. 128a,¶27.)

After learning of your Affiant's assertions, Detectives Debraska, O'Keefe and Paul Stuhmer contacted the U.S. Customs Internal Affairs Agency in July of 1994 and claimed that three years prior, March 14, 1991, they had contacted U.S. Customs Agent Buford Gates regarding the Binwalee/Russell homicide investigation, and alleged that Gates had "stonewalled" them during their "visit," (Petition App. 134a), and that Gates "acted as though I [Gates] had something to hide." (*Id.*; App. 145a,¶2.)

Buford Gates did not learn of this event – O'Keefe or Stuhmer's complaint to Customs Internal Affairs – until nearly a year later after he was transferred to anther federal position in Washington, D.C. in 1994. (Petition App. 134a.)

Once the Internal Affairs investigation was concluded and Gates was entirely exonerated legally and administratively, Gates filed a Freedom of Information Act request with Internal Affairs and received the file detailing the complaint(s) made by O'Keefe and Stuhmer. (Petition App. 134a, ¶2; 145a, ¶3.)

On October 11, 1994, an Internal Affairs report regarding the allegations made against Gates indicates that a "meeting with MPD officer(s) where they states late 1990 or early 1991 [redacted] [Piscitello] came to them and advised of two murders and that he

had told 'federal people' about them and they would 'take care of it.'" (Petition App. 172a, ¶6.)

This IA report itself definitely contradicts the testimony given by Detective Brian O'Keefe at the March 8, 1991 search warrant proceeding (*see supra* at 16-18), where he specifically assured Commissioner Brooks that MPD had no knowledge of the homicides prior to March 7, 1991 and definitely establishes that Detective Vincent Vitale lied at your Affiant's trial where he testified that MPD had no knowledge of the homicides "at the time Mr. Piscitello was an informant." (*See supra* at 31.)

MPD officers gave this information to U S. Customs I.A. themselves, three years after their fabricated search warrant and trial testimony.

On May 16, 1996, Gates wrote to Reddin a detailed complaint about the conduct of Debraska, O'Keefe and Stuhmer, grieving the false accusations pressed against him, then called Reddin to inform him of the complaint and that Gates was forwarding it to his office. (Petition App. 142a-143a.) In the letter, Gates also notes that the local United States Attorney (Thomas P. Schneider) and Reddin "declined" to review the case and prosecute him for crimes with respect to law enforcement covering up the murders. (Petition App. 146a,¶1.) But this move by Schneider and Reddin to not expand the cover up of the murder investigation years later is ostensibly to continue to ensure your Affiant would not obtain exonerating post-conviction relief and Milwaukee law enforcement dealings with Piscitello in the murders would not come to light. (*See* Exhibit 11 at 8-9.)

On June 2, 1996, Reddin wrote a one paragraph response to Gates' complaint, indicating he remembered little regarding "the bodies in the basement." (*Id.*; App. 159a.)

On June 19, 1996, Gates wrote a detailed complaint, with exhibits, to Milwaukee Police Department Chief Phillip Arreola, to further grieve Debraska, O'Keefe, and Stuhmer's wrongful conduct. By August 19, 1996, Gates had not received a reply from Arreloa, and so wrote again. (*Id.*; App. 161a-173a.)

On June 20, 1996, Gates again wrote to Reddin complaining not only of Debraska, O'Keefe and Stuhmer's conduct, but also Reddin's lack of concern over that complaint's details and Reddin's "brevity" in his [Reddin's] brief response. (Petition App. 143a; 174a-176a.)

On August 23, 1996, Chief Arreola's office finally acknowledged Gates' complaint and stated that the matter was turned over to the "Internal Affairs Division to conduct an investigation into this matter. We will advise you [Gates] of the results of our investigation when it has been completed." (Petition App. 179a.) Buford E. Gates was "never contacted as a witness" nor did he "ever receive notification of the results of their investigation." (Petition App. 143a.) Then again, the results of such an investigation would logically end up in the Milwaukee D.A.'s office; it is no wonder it died there.

On August 19, 1996, Gates further wrote D.A. McCann complaining of Reddin's lack of concern for the complaints Gates filed with Reddin. (Petition App. 177a-178a.)

On December 5, 1996, McCann's office replied to Gates' complaints stating a litany of reasons why their office cannot deal with Gates' complaint regarding the misconduct of Debraska, O'Keefe, and Stuhmer in this case. (Petition App. 181a-182a .)

The same prosecutors, Milwaukee detectives and Milwaukee Police Department personnel – including Chief Phillip Arreola – whom ignored and dismissed Attorney Peter N. Flessas' complaints about keeping your Affiant from seeing him on April 22,

1991, are the same actors whom ignored, dismissed and disregarded an esteemed and accomplished federal agent's complaints of Milwaukee police misconduct against Buford E. Gates. What makes this fact disconcerting, is that both instances of misconduct took place against accomplished professionals, and such misconduct directly stems from your Affiant's exposure to, deliberate framing for, eventual arrest, prosecution and wrongful convictions for the August 19, 1989 murders of Mohammad Binwalee and Dion Russell.

Conveniently, as your Affiant began to shake the tree of truth and justice through his appeals in 1994, lead detective (O'Keefe) who we now know blatantly lied at the April 15, 1991 arrest warrant proceeding – about Joanne Danbrova's testimony to him, about Danbrova being at the 941 South 35th Street residence the night of the murders, and again about being called by Danbrova the morning of that same hearing to "clarify" a previous statement – and O'Keefe's partner, Paul Stuhmer, elected to suddenly complain to Customs Internal Affairs about Agent Gates withholding evidence at their March 14, 1991 "visit," and just happened to forget to report this so-called 'obstruction of justice' until the *exact* moment your Affiant exposed the *fact* Milwaukee law enforcement *knew* of the murders *prior* to March 7, 1991. These efforts of O'Keefe and confederates should be evaluated in the context that at that time (July 1994), the Binwalee-Russell murder investigation were officially closed *since 1991*, so there was no reason for O'Keefe et al. to "revisit" the March 14, 1991 Gates issue unless they had some incriminating ends to cover up.

The most poignant question relative to this entire charade prosecuted by Milwaukee law enforcement is this:

Detective Barry Debraska re-opened Piscitello as an informant in October 1988, *see supra* at 3. For approximately 10 months time, Debraska specifically had Piscitello setting Mohammad Binwalee, Dion Russell, and their associates up for drug related offenses. Arguably, Binwalee and Russell could not so much as leave a residence without Debraska knowing it, so focused and intense were these drug investigations.

Query why, then, that after the August 19, 1989 murders, that Debraska would have *never* asked Piscitello where Binwalee and Russell were or what happened to them when they literally fell off the face of the planet?

We now know that through at least November 18, 1990, Piscitello worked with Debraska et al., and despite all of the time, resources and effort that was expended toward these drug investigations – not to mention all others associated with Binwalee being arrested for drug related offenses due to Debraska et al. and Piscitello's efforts and Binwalee's fugitive warrants in Chicago and by the FBI – Debraska didn't bat an eye when Binwalee and Russell suddenly disappeared?

The answer to this query is simple: Debraska already knew as Piscitello attests. (Petition App. 93a, ¶7; *see also supra* at 7-8.) Every event that occurred *after* the March 7, 1991 confession of Piscitello, occurred to cover up this fact, and its subsequent consequences, and therefore definitively proves that all of the criminal proceedings in this case were purposefully contrived to obscure these facts.

In short, Milwaukee law enforcement and prosecutors were intent on keeping the lid on the very scandal that became known during the Gates' proceedings. Maintaining their conspiracy of silence in connection with your Affiant here was part of that effort. Indeed, Agent Buford E. Gates said it best in his own personal quest for vindication and

justice: "Law enforcement officers and officers of the court have no legitimate reason to lie . . unless they are covering something up." (Petition at 19.) Lead homicide detective Brian O'Keefe lied not once ... not twice ... not three times ... but four times as an officer of the court and under oath at the March 8, 1991 search warrant and April 15, 1991 arrest warrant proceedings, including the May 15, 1991 preliminary hearing. These are not some vague inferences but logically deduced facts, demonstrable by Milwaukee law enforcement's own reports and employees.

What is more, comparing the prosecutors' relationships in this case with each other to that of ordinary criminals in any conspiracy brings the uniqueness of your Affiant's case into stark focus. E. Michael McCann was the Milwaukee County District Attorney at the time your Affiant's case was formally charged. McCann had been elected District Attorney in November of 1968 and suddenly stepped down in January 2007 when his successor John Chisholm was sworn in. McCann assigned his two close advisors to this case: Jon N. Reddin, who eventually became number three in the Milwaukee D.A.'s office; and Deputy Chief Robert D. Donohoo who became number two when his predecessor Thomas P. Schneider was appointed to the local United States Attorney post. It is within the detailed and supported evidence set forth in the Petition and the affidavit herein that both Reddin and Donohoo actively participated in the murder investigation from the beginning. Donohoo was assigned the responsibility of prosecuting the March 8, 1991 search warrant proceedings. Reddin also became immediately involved in the case and was assigned the responsibility of prosecuting the April 15, 1991 arrest warrant and trial proceedings in your Affiant's case. To further illustrate the long-term and cozy relationship between McCann and Donohoo and Reddin in the Milwaukee

D.A.'s office, after McCann's recruitment in 1973, both Donohoo and Reddin followed McCann to the Milwaukee D.A.'s office, to eventually become McCann's number two and number three in McCann's hierarchy. At the same time, years after your Affiant's convictions, Schneider, formerly the number two in McCann's pecking order, plainly was in a position to influence against any federal investigation of Milwaukee law enforcement covering up the murders and criminal civil rights violations, just as he had already helped foster and tolerated your Affiant's wrongful prosecution. (*See supra* at 37-38.)

And while your Affiant already had wrongfully languished in prison for some 18 years, the Milwaukee prosecutors and their compatriots in this case flourished – such as in voting themselves big pensions and milking the system. Several of those recently mentioned on October 4, 2010, during a Milwaukee talk radio show (620 WTMJ News Radio), were members of the Milwaukee D.A.'s office. Reddin just happened to be included on the corrupt political connection list that also 'unexpectedly' decided to retire in late 2009 with $976,000.00 in pension payments. Reddin's decision to retire is especially curious because, on the basis of this case now coming to light having a seismic impact on Reddin's career, it would appear Reddin *had* to retire now; direct exposure of Reddin's intentional misconduct would nullify the $976,000.00 pension payment to Reddin.[8]

As detailed above, your Affiant's convictions were the direct result of the Milwaukee law enforcement and prosecutors' deliberate fabrication of evidence and by fundamental violations of due process. As such, your Affiant hereby expressly and

[8] An important fact, Reddin and other Milwaukee law enforcement and prosecutors named herein could be criminally prosecuted under 18 U.S.C. §§ 241and 242, after all is said and done with this case.

unequivocally declares, as he has from the onset of these charges, that he is actually innocent.

B. THE 'AS-YET-UNDISCLOSED-STATE EVIDENCE.'

Your Affiant has spent nearly 20 years in prison and he still has not yet received a complete file on the August 19, 1989 murders. As confirmed above, that file contains numerous 'as-yet-undisclosed-state-evidence' that documented the evidence pointing to Milwaukee detectives Debraska et al and informant/co-defendant Piscitello working side-by-side with each other before, during, and after the murders, and they later participating with the lead homicide detectives (Detectives Brian O'Keefe et al.) to deliberately secure false testimony when your Affiant's arrest was made in April 1991. (*See* attached Exhibit 11 at 1-10.) None of these relevant reports had been provided to Petitioner or his counsel. Indeed, it may be impossible to prove your Affiant's meritorious claims of Milwaukee law enforcement and prosecutors' deliberate fabrication of evidence and frame up without such Court ordered 'as-yet-undisclosed-state-evidence.' In requesting this habeas discovery, your Affiant is seeking to determine whether to have an evidentiary hearing, as the 'as-yet-undisclosed-state-evidence' would not only be beneficial to his claims of innocence but it might obviate the need for such a hearing and additional judicial resources. (*See* Rehearing Petition at 10.)

Scott Alan Heimermann

Subscribed and sworn to before me
this 30th day of December, 2010.

Notary Public, State of Wisconsin
My Commission Expires: 11-2-14